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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUHTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

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STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is an appeal from a decree entered in the District Court of the United States for the Southern District of Illinois, by a statutory court of three judges under the provisions of Section 266 of the Judicial Code, as amended by the Act of February 13, 1925. That Court granted a decree for a temporary injunction as prayed in the amended

bill filed by appellee against the appellant, and denied the motion of appellant to dismiss the bill for want of equity, and thereupon, appellant having elected to stand by his motion, the Court by the decree awarded a permanent injunction against appellant, as prayed in the bill, for the reason stated in the opinion of the Court. (R. 24-28.)

The original bill in this case was filed in said District Court on July 21, 1927, and upon the motion of appellant was dismissed by the District Judge, for the reasons set forth in his opinion, as reported in 27 Fed. (2nd) 1005. The appellee then appealed to the Circuit Court of Appeals for the Seventh Circuit, which reversed the order of the District Court on the grounds stated in its opinion reported in 30 Fed. (2nd) 322. Appellant then appealed to this Court, and upon the hearing this Court held that the District Judge was without authority to hear and determine the motion to dismiss the bill, but that he should have called two other judges to his assistance in determining the application for a temporary injunction, and therefore reversed the order of the Circuit Court of Appeals and remanded the cause to that Court with directions to dismiss the appeal to it for want of jurisdiction, as shown by the opinion of this Court in 282 U. S. 10.

Pursuant to that decision, the cause was remanded and thereafter reinstated in the District Court for further proceedings, in conformity with the opinion of this Court. An amended bill of complaint was then filed by appellee, which is substantially the same as the original bill. The amended

bill shows that the appellee corporation was organized under the laws of the State of Missouri, and was admitted to do business in Illinois on October 19, 1903. Appellee at that time had authorized capital stock in the amount of $55,000,000, of which $50,000 was then represented in Illinois. Appellee afterwards increased its authorized capital stock to $130,000,000, and also increased from time to time its business and property in Illinois until it represented $5,500,000 of its authorized capital stock, on which it paid initial or admission fees in that state. Its issued capital stock was increased to $36,294,750, as shown by its report for the year 1927, which was filed with the Secretary of State of Illinois. (R. 3-6.)

The amended bill also shows that appellee is a common carrier by railroad, engaged in intrastate and interstate transportation of freight and passengers in Illinois and several other states. The annual report filed by it in February, 1927, showed that the total value of its property in all states in the year 1926 was $76,793,697.79, and that the total business transacted by it during that year was $18,201,955.33. The total value of its property located in Illinois was $801,196.00, and the local business transacted by it in that state during that year was $2,868.36, as set forth in its annual report for that year. (R. 6-7.)

Section 102 of the Illinois Corporation Act requires both domestic and foreign corporations, including railroads, to make a report in writing to the Secretary of State in February of each year on forms furnished by him. The

report relating to property and business is made for the preceding calendar year and is required to disclose such facts as to enable him to ascertain the proportion of capital stock represented by business transacted and tangible property located in that State, in order to assess the annual license fee or franchise tax in advance for the next year beginning July 1. Sections 105, 106 and 107 of said Act provide for the payment of the fee or tax to be assessed as follows:

> Section 105. Each corporation for profit including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, **but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.**
>
> Section 106. In ascertaining the amount of the capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total property of such corporation located within this State shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated.
>
> Section 107. In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having

issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; **and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.** (Ex. "C", R. 7, 18-20).

As appellee had issued capital stock in the amount of $36,249,750, it appeared that it should pay at least a minimum fee of $1,000 for the renewal of its privilege of doing business in Illinois for the next year, under the last clauses of Sections 105 and 107. The annual report filed by appellee showed that it had used such a small proportion of its capital stock in Illinois during the preceding year that a tax at the rate specified in Section 105 would be less than the minimum fee of $1,000 specified in Section 107. Therefore, that amount was assessed against appellee, as the minimum fee required to be paid for the privileges granted to it as a corporation having issued capital stock in excess of $20,000,000 (R. 7).

The amended bill filed by appellee alleges that the statute and the tax assessed thereunder placed an unreasonable burden upon its interstate commerce, in violation of Section 10 of Article 1 of the Constitution of the United States, and would deprive it of its privileges and immuni-

ties, in violation of Section 2 of Article IV of such Constitution, and would also deprive it of its property without due process of law and deny it the equal protection of the laws, contrary to the Fourteenth Amendment to said Constitution. Appellee sought both a temporary and a permanent injunction to prevent appellant from enforcing the collection of the tax assessed against it (R. 9-13).

A motion was filed by appellee for an interlocutory injunction and appellant filed a motion to dismiss the amended bill for want of equity. The statutory Court which heard both motions, referred in its opinion to the previous opinions rendered by the District Judge and by the Circuit Court in this case, but stated that it appeared that the question involved had been settled by the later decision of this Court in the case of *Cudahy Packing Co.* v. *Hinkle,* 278 U. S., 460, on a statute deemed to be essentially like the one here involved. The statutory Court therefore awarded a temporary injunction and denied the motion to dismiss the bill, and upon appellant's election to stand by such motion, a final decree was entered for a permanent injunction, as prayed in the bill of complaint.

From this decree, appellant has appealed to this Court and has assigned errors in the granting of such decree for a temporary injunction as well as a permanent injunction and denying the motion of appellant to dismiss the bill for want of equity, on the grounds that the franchise tax assessed against appellee did not impose any unlawful burden on its interstate commerce, or deprive it of its property

without due process of law, or deny it the equal protection of the laws; and also, that the Court erred in holding in effect that Section 107 of the Illinois Corporation Act as applied to appellee, imposes an invalid tax under the decision referred to in the opinion, or under any of the decisions of this Court (R. 20-28).

All of the errors assigned are specified and relied upon by appellant for reversal. Appellant contends that the statute in the *Cudahy case* differs very materially from the nature and effect of the statute involved in the present case. The Illinois Corporation Act requires all corporations organized or admitted to do business in that State and making an annual report, to pay annually at least the minimum fees specified in Section 107 of said Act, as an excise or franchise tax for the right or privilege granted of doing business in that State during the next year. The tax is assessed in advance and it is assumed that the corporation will use a sufficient amount of its capital stock in the State to produce the minimum tax assessed at the rate specified in Section 105, or if not, that it should nevertheless pay such tax for the privileges granted to it by the State.

The position of appellant is that the State has the right to impose a reasonable minimum fee or tax in advance, for the privileges granted by it to a corporation to use its capital in carrying on a local business in the State during the next year, even though such privilege may not have been actually exercised to a substantial extent during the preceding year. The tax is imposed only as a minimum fee for the

privileges granted, which the corporation has a right to exercise if it shall desire to do so. If the corporation should exercise the privileges granted to a substantial extent, then it would be required to pay a higher tax for the exercise or use of such privileges, under the provisions of Section 105. Such a tax does not discriminate against any foreign or domestic corporation, but is applied uniformly to all corporations alike, under the same circumstances. It is a tax upon the privileges granted and does not effect property outside the of the State. It is not designed or intended to impose any burden on interstate commerce, and does not have that effect.

SUMMARY OF ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee or tax for granting the privilege of doing a local business in that State as a corporation.

The provision of Section 105 of the statute for the payment of an annual license fee or franchise tax at the specified rate on the proportion of capital stock represented by property and business in the State, is subject to the further provision that such fee or tax shall not be less than the minimum fee fixed by Section 107, with a maximum limit in the amount of the tax, for the privilege granted of doing business in the State.

General Corporation Act, Ill. Rev. Stats., Chap. 32, Secs. 105, 107.

O'Gara Coal Co. v. *Emmerson,* 326 Ill., 18, 43-4 *(Colgate & Co.* and *Beatrice Creamery Co.)*

II.

The principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The provisions of the Act which require all corporations organized or admitted to do business in Illinois to pay annually a minimum license fee or franchise tax, which is graduated to some extent upon the amount of issued capital

stock and is limited to the specified maximum amount of tax, fix a reasonable excise or franchise tax for the privileges granted and do not violate the Fourteenth Amendment to the Constitution.

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147, 154-8;

Kansas City Ry. Co. v. *Kansas*, 240 U. S., 227, 232-5;

Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68, 82-7;

Tax Commissioners v. *Jackson*, 283 U. S., 527;

Metropolis Theatre Co. v. *Chicago*, 228 U. S., 61, 69.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while the State may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Western Cartridge Co. v. *Emmerson*, 281 U. S., 511, 513;

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S., 113, 120;

United States Glue Co. v. *Oak Creek,* 247 U. S., 321, 326;

Peck & Co. v. *Lowe,* 247 U. S., 165, 173-5;

Kansas City M. & B. R. R. Co. v. *Stiles,* 242 U. S., 111, 119;

Kansas City, etc., Ry. Co. v. *Kansas,* 240 U. S., 227, 234;

New York v. *Latrobe,* 279 U. S., 421;

International Shoe Co. v. *Shartel,* 279 U. S., 429.

IV.

The statutory Court apparently misconceived the nature and effect of the tax here assessed and misapplied the decision in the Cudahy case.

Opinion of Statutory Court, Record 24-25;

Cudahy Packing Co. v. *Hinkle,* 278 U. S., 460;

Postal Tel. Cable Co. v. *Adams,* 155 U. S., 688, 698.

V.

The District Court in its former opinion herein properly construed the statute and the nature of the tax assessed, under the decisions of this Court.

Opinion of District Court, 27 Fed. (2nd) 1005;

General Railway Signal Co. v. *Virginia,* 246 U. S., 500, 511;

Cheney Bros. Co. v. *Massachusetts,* 246 U. S., 147, 154;

Kansas City Ry. Co. v. *Kansas,* 240 U. S., 227, 232-5.

ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee or tax for granting the privilege of doing a local business in that State as a corporation.

The bill of complaint in this case clearly shows that, pursuant to the last clause of Section 105 of the statute, the minimum franchise tax specified in Section 107 was assessed against appellee for the privilege of doing a local business in the State during the next year, inasmuch as appellee had not used a sufficient proportion of its capital stock in the State the preceding year to make it subject to a larger tax under the rate specified in Section 105.

The real question in this case is, whether or not the State may require a corporation organized or admitted to do business therein, to pay a minimum fee or franchise tax, as specified in said Sections 105 and 107, for granting it the privilege of doing business in the State during the next year, although it may not have actually exercised its franchise in the State the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in Section 105.

Sections 105 and 107 of the Corporation Act should be considered and construed together. The effect of both sections is to require every corporation, which desires to main-

tain the right or privilege of transacting local business in the State, to pay at least the fee specified in Section 107, based within the specified limits on the amount of issued capital stock which it may use in the State. Furthermore, if the application of rate specified in Section 105 to the proportion of the capital stock actually represented by property and business in the State will produce a larger tax, then such larger tax must be paid, instead of the minimum fee. In such case, the fee is increased in direct proportion to the exercise of the privilege by the corporation.

The amount of issued capital stock of appellee in this case is $36,249,750. As its issued stock is in excess of $20,000,000, the minimum fee to be paid is $1000, which is the maximum amount provided by Section 107. A tax at the rate of five cents on each one hundred dollars, as specified in Section 105, would require the use of only $2,000,000 in the State to produce a tax amounting to $1000. The amount so required to be used is only about 5.5% of appellee's issued capital stock and only 2.2% of the total value of its property or assets. This required amount is much less than the $5,500,000 on which appellee has paid the initial or admission fees, and which it may therefore be expected to use in that State (R. 6).

It would seem to be reasonable for the State to require a corporation having a license to carry on business in the State to use at least this small proportion of its capital or assets in the State, when it has sought and been granted the privilege of doing so, or in any event, that it should pay a tax on such proportion at the rate specified, for maintaining

its rights in the state and exercising them as it desired. The state grants such privileges each year in advance and the corporation may exercise them by using as much of its capital in the State as may be convenient or desirable for it during the year.

The report of appellee showed that the property used by it in Illinois the preceding year was valued at $801,196.00 and that its local business in that State during such year amounted to 2,868.36. While this amount is comparatively small, such local property and business connections may add materially to appellee's total property and business. The total value of all its property was more than twice the amount of its issued capital stock, and its total business during the preceding year amounted to $18,201,955. It thus appeared that appellee had been exercising its franchise to some extent in Illinois during the preceding year, and such use might be increased if desired. In renewing or continuing its franchise, the State gave it the right to maintain its privileges and use such part of its capital in carrying on business in the State during the next year as it might desire, without the payment of any additional tax for such privileges.

II.

The principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The principal of a franchise tax imposed upon a basis similar to that provided by Section 107 of this Act has been

upheld by this Court in several cases. In *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, a statute of Virginia imposed a franchise tax for authority to do business in the State, which was graduated to some extent upon the amount of authorized capital stock, the fee being $1,000 for all corporations having an authorized capital stock of $1,000,000 to $10,000,000. The corporation in that case had an authorized capital stock of $5,000,000 and was therefore required to pay a tax of $1,000 for the privilege of being allowed to perform contracts in the State which amounted to $85,597. The Court held that such a tax was not arbitrary or unreasonable and did not impose any burden upon interstate commerce.

In the case of *Kansas City, Ft. Scott & Memphis R. R. Co.* v. *Kansas*, 240 U. S., 227, the statute imposed a graduated franchise tax upon corporations, with a maximum limit of $2,500 on capital stock amounting to over $5,000,000. The Court again held that such a tax was reasonable and did not impose a burden upon interstate commerce, or violate the due process or equal protection provisions of the Fourteenth Amendment, although a large part of the property and business of that corporation was outside the State.

In the case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68, the statute imposed a tax of 1/50 of 1% of the authorized capital stock of foreign corporations for the privilege of doing a local business in that State, with a maximum limit of $2,000 on a capital stock of $10,000,000 or

more. The Court held that in view of the limitation and conditions, such a tax was reasonable and did not necessarily burden interstate commerce or deny the equal protection of the laws to foreign corporations engaged in interstate commerce.

The Court again approved the Massachusetts statute in *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S., 147, in the case of a foreign corporation doing a local business in that State, and also engaged in interstate commerce. However, after the maximum limit of the tax was removed by that State, and the tax was computed on the entire authorized capital stock, the Court held the statute invalid in the case of *International Paper Co.* v. *Massachusetts,* 246 U. S., 135, on the ground that it thus imposed an unreasonable burden upon interstate commerce, and taxed property outside of the State.

The latter case followed the decision in *Looney* v. *Crane Co.,* 245 U. S., 178, in which the corporation had been admitted into the State in 1905, upon payment of a fee which was limited to $200 for a permit to do business for ten years, and thereafter paid an annual franchise tax until the permit was about to expire in 1915. During that time the maximum limit on the permit tax had been removed, thus increasing the tax to $17,040 on the entire authorized capital stock. The annual franchise tax was also computed on that basis, or on the issued stock, surplus and undivided profits, in case they exceeded the amount of authorized stock and the tax was thereby also greatly increased. The Court

held the statute invalid as to both the permit tax and the annual franchise tax, on the ground that it thus imposed a tax upon the entire authorized stock or capital of the corporation, without any limitation on the amount of the tax.

The Court in that case and also in the *International Paper Company* case expressly distinguished the other cases cited (*Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, Fort Scott & Memphis Ry. Co.*, v. *Kansas*, 240 U. S., 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S., 111). In those cases the Court approved statutes which contained provisions qualifying or restricting their operation and effect, such as the subject matter on which the tax was levied, or limitations on the amount of the tax, which restricted it to a reasonable maximum amount for the privilege granted, as in the present case. Those cases are directly applicable here and sustain the tax imposed in this case.

The principle of a graduated tax has been recently approved by this Court in *Tax Commissioners* v. *Jackson*, 283 U. S., 527, as applied to a number of so-called chain stores in the state of Indiana. The differences or advantages in the operation and management of a number of such stores, as compared with stores separately owned and operated, were held to justify a higher graduated tax, which was not arbitrary or unreasonable and did not violate the Fourteenth Amendment. So in the present case, the greater value of the privilege granted of using a large amount of

issued stock in the state may very well justify a higher graduated tax to a limited extent than the tax imposed for the privilege of using a small amount of stock in the state. Several other cases are referred to in the opinion in that case in which the same principle was applied, as in *Metropolis Theatre Co.* v. *Chicago,* 228 U. S., 61, in which license fees were based and graded on the admission fees charged by the theatres in that city.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee.

This Court has frequently held that a franchise tax on corporations cannot be held to be repugnant to the commerce clause of the Constitution, merely because it is measured by the capital stock of such corporations. The rule applicable in such cases was clearly stated by the Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S., 290. The Court there upheld a franchise tax which was assessed under the Illinois statute against a foreign corporation, and which was computed upon the entire authorized capital stock, although more than nine-tenths of the business transacted was measured by sales made in interstate commerce. In considering the validity of the statute and the tax assessed, the Court said, at page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only

> incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * *
>
> The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact distantly affect it."

This case was followed in the recent decision of this Court in *Western Cartridge Company* v. *Emmerson,* 281 U. S., 511, in which it appeared that more than five-sixths of the goods produced in that State were sold and shipped in interstate commerce, which were included in determining the amount of business transacted in that State. It was held that the inclusion of such business in computing the tax did not even indirectly burden interstate commerce, or indicate any intention on the part of the State to do so, and that if there was any burden at all, it was indirect and remote and did not violate the commerce clause.

This question was also fully considered in the case of *Kansas City Ry. Co.* v. *Kansas,* 240 U. S., 227, in which an annual graduated tax with a maximum limit was computed upon the issued capital stock of a railway corporation engaged in interstate commerce. After holding that the State would not be barred from imposing a tax upon the privilege granted, merely because the corporation is engaged in interstate as well as intrastate commerce, the Court said, at page 232-3:

> "And agreeably to the principle above mentioned, it has never been and cannot be maintained that an annual tax upon this privilege is in itself and in all cases, repugnant to the Federal power merely because it is measured by the authorized or paid up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

Likewise, in the case of *Kansas City M. & B. R. R. Co.* v. *Stiles,* 242 U. S., 111, in which a franchise tax was measured by the entire capital stock of a consolidated railroad company, it was urged that the statute was void because it taxed property outside the State and imposed a direct burden upon interstate commerce. After referring to the discussion of those questions in the above case and stating that it was there held that the State might measure a tax within its authority by capital stock which in part represented property beyond the taxing power of the State, the Court further said, at page 119:

> "So of the objection that the tax imposes a burden upon the interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, etc., Railway Co.* v. *Kansas, supra,* is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

The same principle applies in the case of a franchise tax measured by the net profits of a corporation. In *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., 113, an

annual franchise tax was imposed by the State of Connecticut upon a foreign corporation, under a formula which allocated 47 per cent of its profits to that State, although only a little over three per cent of such profits were made from sales in the state. It was contended that the tax burdened interstate commerce and business in other states. The Court held, however, that a tax measured by such profits was entirely valid, although derived in part or mainly from interstate commerce. The Court applied the same principle with respect to franchise taxes measured by net profits in the cases of *United States Glue Co.* v. *Oak Creek*, 247 U. S., 321, and *Peck & Co.* v. *Lowe*, 247 U. S., 165.

This Court has specifically upheld statutes very similar to that involved in the present case, even though in some cases, as in *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, and other cases, the tax was measured by the authorized instead of issued capital stock, with a maximum limit in the amount of the tax. The difference in the principle of a statute which measures a tax by authorized instead of issued stock, when applied to a corporation having a substantial amount of unissued stock, however, may well account for the contrary decision in the case of *Cudahy Packing Company* v. *Hinkle, supra.* The difference also in the basis and general application of the tax is that case from the very limit application and amount of the tax in the present case, would seem to be entirely sufficient to sustain the validity of the statute and the tax imposed in this case.

The application of the statute to appellee in the present case certainly cannot be considered as made for the pur-

pose or as having the effect of defeating Federal constitutional rights. Neither can the tax imposed affect interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of or restraint or burden on such commerce. The statute is clearly designed and intended to impose only a reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the State during the next ensuing year, and of exercising such privilege to a limited extent if desired, without any additional charge for so doing. It seems clear that the statute, as so intended and as applied in this case, cannot be deemed to violate the commerce clause of the Federal Constitution, or any provision of the Fourteenth Amendment thereto.

IV.

The statutory Court apparently misapplied the decision in the Cudahy case to the statute involved in the present case.

It appears from the memorandum opinion herein that the statutory Court assumed that the decision of this Court in the *Cudahy case* involved a similar statute and was therefore controlling in the present case. We believe it can be demonstrated that the Washington statute and the facts involved in the *Cudahy case* were essentially different from the statute and situation here involved, and that consequently such decision is not directly applicable or controling in this case.

In the *Cudahy case,* the statute required the tax to be computed upon the entire authorized capital stock, regardless of the fact that less than two-thirds of such stock had been issued. Under the Illinois statute, only the issued stock is considered in determining the minimum fee which should be assessed for the privilege granted by the State.

The total value of the property owned by the corporation in the *Cudahy case* did not exceed the amount of its issued stock. The authorized but unissued stock did not represent any property or business of the company and afforded no basis for the computation of the tax. In the present case, the property alone amounts to more than twice the value of the issued stock which was considered to a limited extent in determining the minimum fee to be assessed for the privileges granted by the State.

The State in the *Cudahy case* imposed an additional permit or admission fee on account of an increase in the amount of authorized stock, as well as an annual franchise tax computed upon the entire amount of authorized capital stock, without regard to the amount issued or used in the State. The present case involves only an annual franchise tax, which is limited to a low maximum amount, and would require the use of less than half of the amount of stock on which an admission fee was previously paid to produce the tax assessed.

The Washington statute also differed radically from the statute here involved, in that the tax there was com-

puted solely on a graduated amount of authorized capital stock, without any minimum fee or increase in proportion to the amount used in that state. The statute thus failed to make any distinction between corporations using little or no capital stock in the state, and those which used a large part or all of their capital in that state. It therefore appeared that no consideration was given to the difference between the value of the right to use the privilege granted, and the value of such privilege when largely or fully exercised by the corporation.

In the present case, the statute provides primarily for the payment of an annual license fee or franchise tax for the next year, to be computed at the specified rate upon the proportion of issued capital stock used in the state in the preceding year. However, if the corporation has used a very small part or none of its capital in the state the preceding year, it is apparent that an adequate tax cannot be assessed on that basis for granting or continuing its privileges for the next year. The statute therefore provides that in such cases a comparatively small minimum fee or tax shall be imposed for the privileges granted for the next year, which is graded to some extent upon the amount of issued stock which may be used in the state, with a low maximum limit on the amount of tax which may be imposed.

These essential and substantial differences in the basis and extent of the tax as imposed in this case clearly distinguish it from the *Cudahy case* and afford proper grounds for a different conclusion in this case. The tax here imposed

is strictly a franchise tax for the privilege granted of doing a local business as a corporation in the state. The amount provided is very reasonable in proportion to the issued capital stock in the several gradations which may be used, and likewise is limited to a comparatively small maximum amount. If such a reasonable excise or franchise tax may not be imposed for the privilege granted, then a foreign corporation may be admitted to do business in this state upon the payment of a trifling amount in the first instance, and may thereafter maintain the right or privilege of doing business in the state from year to year perpetually without any further payment, regardless of the value of the privileges granted by the state and received by the corporation.

In this case, appellee admittedly carried on a local business in Illinois and had a substantial amount of its property within the state. Furthermore, it had the privilege of increasing the amount of its property and business in that state during the next year without paying any additional tax, until the application of the rate specified in Section 105 would produce an amount in excess of the minimum tax provided by Section 107 of the Act. The fee charged was an excise or franchise tax for the privilege granted, and was not a tax on property outside the state. There is a reasonable relation between the charge and the privilege granted, which applied to all corporations alike under the same circumstances, and did not discriminate against the appellee in this case. It therefore appears that

neither the statute or the tax assessed would violate the equal protection or due process clause of the Fourteenth Amendment.

The statutory Court in deciding this case appears to have applied general rules which were applicable to the *Cudahy case,* but failed to distinguish the different characteristics of the statute in this case. That Court therefore appears to have overlooked the doctrine stated by this Court with respect to the exercise of the taxing power by a state, in the case of *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S., 688, 698: "The substance and not the shadow determines the validity of the exercise of the power." It seems clear that a consideration of the substance of the statute as applied in this case will disclose that it was a valid exercise of the taxing power of the State.

V.

The District Court in its former decision correctly construed the Statute and applied it to the situation in this case.

The memorandum of views of the District Court in the former decision in this case clearly sets forth the nature and purpose of the tax imposed under Section 107 of this Act, and distinguished it from a tax computed at the rate specified in Section 105. After stating the contentions of appellee and setting forth the provisions of the two sections of the statute, the District Judge said in his opinion, as reported in 27 Fed. (2nd) 1005:

> The two statutes here involved attempt to tax two entirely different things. Section 107 is clearly 'a franchise tax', while Section 105 provided a tax upon 'the exercise of the franchise' and does not become operative until the business done and property used in the exercise of the franchise, measured by the standards provided in Section 105, produce an amount equal to or greater than the amount of the mere franchise tax provided in Section 107. When that point is reached in the exercise of the franchise, then Section 107 ceases to be operative and Section 105 control the amount."

The Court in that opinion also clearly distinguished the *International Paper Company case* and like cases there referred to and followed, including the *Crane Company* case, and showed that the present case comes directly within the principles applied in the *General Railway Signal Company* case. After referring to the privileges granted to appellee by the State, for which the tax was imposed, and replying to its contentions in regard to the tax, the Court also referred to the comment on the status of the *Signal Company* case, and quoted the conclusion of Mr. Justice McReynolds in the opinion rendered by him in that case, as follows:

> "Considering what we said in (citing a number of decisions of the Court) the two characteristics of the statute just referred to must be regarded as sufficient to save its validity."

And the District Court added in its opinion herein:

> "The two characteristics referred to by Mr. Justice McReynolds are: (1) That the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed: (2) in the class to which plaintiff in error belongs the amount specified is $1,000 and 'under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.' "

> "So, in this case, we conclude that the case made out by plaintiff's bill may also be along the border line, but the taxing statutes here involved, possessing the two characteristics referred to in the *General Railway Signal Co. case, supra,* must be regarded as sufficient to save their validity."

The statute here involved is more reasonable and closely related to the privilege granted than any similar statute heretofore considered by the Court in any case, in that it provides the issued capital stock instead of authorized stock as the measure of the tax on a restricted scale, and also fixes a very low maximum limit in the tax for the privilege of using the amount of stock to which it applies. In the present case, the tax amounts to only $1 for each $36,249.75 of the issued capital stock, and in no case could the maximum tax amount to more than $1 for each $20,000 of such stock. The imposition of such a small franchise tax for the valuable privilege granted and actually exercised by appellee in this case is not only reasonable but could not burden interstate commerce or tax property outside of the State.

The fact that appellee actually has some property and is transacting some business in the State does not affect the right of the State to impose the minimum tax against it, as provided by Section 105 and 107. Appellee is required to pay no more than other corporations with a like amount of capital stock, but which merely maintain their right to do business in the State, and therefore it cannot complain on that ground. The contention urged by appellee would

clearly discriminate against such other corporations and in favor of corporations actually having a comparatively small amount of property and business in the State. Such a construction would necessarily invalidate Section 107 and leave the State without any power to impose any franchise tax for granting the privilege to corporations to do business in the State from year to year.

The privilege granted by the State to a foreign corporation to transact a local business with its property is a valuable privilege, even though it may not be immediately exercised to any great extent. The value of the franchise necessarily bears a most legitimate relation to the amount of capital stock which may be used in the exercise of the franchise. The grant of such a privilege to the corporation gives it the right to use as much of its capital stock as it may see fit in carrying on its business in the State. This clearly affords a valid basis for imposing a franchise tax on such a corporation, measured to some extent by the capital stock which may be used, with a reasonable limit in the maximum amount of tax which may be imposed for the privilege granted.

For the foregoing reasons, it is respectfully urged that the statute as applied in this case does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto, as alleged in the bill of complaint, and that therefore the decree of the statutory Court in this case

should be reversed and that the cause should be remanded to the District Court with directions to dismiss the bill of complaint.

Respectfully submitted,

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